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Two Modes of Legal Thought

George P. Fletcher*

We should begin with a confession of ignorance. We have no jurisprudence of legal scholarship. Scholars expatiate at length on the work of other actors in the legal culture—legislators, judges, prosecutors, and even practicing lawyers. Yet we reflect little about what we are doing when we write about the law. We have a journal about the craft of teaching,¹ but none about the craft of scholarship.

In view of our ignorance, we should pay particular heed to our point of departure. I start with the observation that legal scholarship expresses itself in a variety of verbal forms. Descriptive propositions about the law, normative claims about what the law ought to be, and exhortations to decisionmakers to change the law are but examples of the variety of forms that appear in scholarly writing about the law. My initial task in this article is to work out some important distinctions among these verbal forms. Those distinctions generate a framework that I then use to make two more adventurous claims. I claim first that we can usefully distinguish between two modes of legal thought, which I shall call “committed argument” and “detached observation”; and further, that whether we engage exclusively in one form of legal scholarship or another depends on our implicit assumptions about the nature of law. With these bolder theses defended, I then analyze how scholars can and do make persuasive claims in the mode of committed argument.

I. Claims That Scholars Make

To develop a taxonomy of legal claims, I borrow from the conventional distinctions used in classifying propositions in moral discourse. Academic writings about ethics conventionally distinguish between

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1. The Association of American Law Schools publishes the *Journal of Legal Education*.

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normative ethics and meta-ethics.² The former consists of propositions asserting that particular conduct is right or wrong, good or bad. The latter consists of analytic and structural propositions about normative claims made by others. In the history of ethics, normative (first-order) claims dominated the field. With the writing of Nowell-Smith³ and Hare,⁴ meta-ethics came into vogue in the middle decades of this century. In the last decade, meta-ethical analysis has taken new turns,⁵ and philosophical interest has returned to the traditional task of asserting and defending conceptions of the right and the good.⁶

Meta-ethical claims differ from claims about conventional morality. Though both express views on what others say, their modes of support diverge. Meta-ethical claims focus on the concepts and the language used in ethical discourse. A few paradigmatic examples provide all the data necessary for the meta-ethical analysis. By contrast, claims about conventional morality take the form of descriptive hypotheses. They require the mustering of data. Extrapolation from a few examples can hardly prove claims about the content of conventional moral views.

The taxonomy thus distinguishes three types of statement. *First-order* statements are substantive claims about what is right or wrong, good or bad. *Meta-ethical* statements are propositions about the logical nature of moral discourse—for example, the view that moral statements are mere expressions of personal feeling. *Descriptive* statements are generalizations about the moral views of a particular culture.

To bring these distinctions to bear on legal discourse, we should first address the question: what is a first-order legal statement? Consider the following assertions: "The death penalty is constitutional (or unconstitutional)." "Racial discrimination is tortious (or nontortious)." "Your conduct under these facts renders you liable for damages." These statements follow the pattern of first-order moral statements, such as "lying is wrong" and "the death penalty violates

2. For an introduction to these matters, see Nielsen, *Problems of Ethics*, in 3 *THE ENCYCLOPEDIA OF PHILOSOPHY* 117 (1967), and J. MACKIE, *ETHICS* 19-20 (1977).

3. P. NOWELL-SMITH, *ETHICS* (1957).

4. R. HARE, *FREEDOM AND REASON* (1963); R. HARE, *THE LANGUAGE OF MORALS* (1952).

5. The significant works in this movement include R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), C. FRIED, *RIGHT AND WRONG* (1978), R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974), and J. RAWLS, *A THEORY OF JUSTICE* (1971). The revival of normative ethics dovetails with the rejection of utilitarianism and the cultivation of the deontological moral theories. For some comments on this shift in philosophical orientation, see Barry, *And Who Is My Neighbor?* (Book Review), 88 *YALE L.J.* 629 (1979) (review of Fried's *Right and Wrong*).

6. See Wiggins, *Truth, Invention and the Meaning of Life*, 62 *PROC. BRIT. ACAD.* 331 (1976).

human dignity"; they might therefore seem to be first-order legal statements. Yet there is an ambiguity in both the legal and moral statements that we should bring to the surface.

Let us focus on two instances of the statement, "The death penalty is X": in one case, X stands for a moral predicate, such as "wrong," and in the other, X stands for a legal predicate, such as "unconstitutional." Both the moral and legal versions of the statement, "The death penalty is X," lend themselves to two interpretations. Each statement could be a first-order claim, namely, a substantive assertion that the death penalty is wrong or unconstitutional. Alternatively, it could be a description of the way other people regard the death penalty. The latter interpretation of a constitutional statement would be appropriate if we were reporting the official view of those entrusted with expounding the Constitution. That is, if the Supreme Court had so held, a commentator might report the decision by saying, "The death penalty is unconstitutional," and thereby intend merely to describe a holding of the Supreme Court. A descriptive claim of unconstitutionality would be analogous, then, to a descriptive claim that capital punishment is wrong according to the prevailing sentiments of the society. Let us diagram this analogy thus:

Statement	Support
1. The death penalty is wrong.	A survey of what other people think about the death penalty.
2. The death penalty is unconstitutional.	An authoritative holding that the death penalty is unconstitutional.

Consider now what it would mean for the statement, "The death penalty is unconstitutional," to be a first-order legal proposition. If the statement appeared in a Supreme Court opinion holding the death penalty unconstitutional, we would be inclined to identify the statement as a first-order statement about the Constitution. It would not be a descriptive proposition about the language of the Constitution; nor would it plausibly lend itself to characterization as an interpretation of specific language, such as that of the Eighth Amendment. Yet we might have difficulty perceiving the structural analogy between a legal conclusion in a Supreme Court opinion and a moral conclusion reached in everyday discourse.

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The factor of authority distinguishes legal from moral discourse. We are all equally situated to make moral claims about the right and the good. Yet the Supreme Court seems to be in a special position to make statements about the Constitution. A statement in a Supreme Court opinion about the constitutionality of the death penalty enjoys a force that the same words in a law review article would not have. Why should this be so?

To answer this question, we must consider the impact of authority on the nature of legal discourse. We could think of the Supreme Court's statement as either a *declaration* of unconstitutionality or an *assertion* of unconstitutionality. The difference is important. Declarations are acts that have force by virtue of the authority of the declarant. They might be politic or impolitic, useful or deleterious, but they are not true or false.⁷ Thus, if the Supreme Court declares the meaning of the Constitution, we might question the political wisdom of the decision, but one could hardly say that the Court's statement was true or false. The Court cannot declare what the Constitution means and at the same time make a mistake about the true meaning of the Constitution.

Assertions are different. An assertion or a claim about the meaning of the Constitution presupposes that the claim could be wrong, though in making the assertion, of course, we seek to get the matter right. Thus, if the Court's conclusion of unconstitutionality is not a declaration, but an assertion, the criteria of truth and falsity come into play.

How then do we decide whether the Court's holding is a declaration or an assertion? To answer that question we must examine the bearing of meta-theories on the logical nature of both moral and legal discourse.

II. Meta-Theories of Legal Statements

As noted earlier, the meta-ethical literature seeks to clarify the logical nature of moral statements.⁸ Some philosophers hold that moral statements are but the expression of personal preference.⁹ Others argue, more convincingly, that moral claims have a truth value (that is, they are either true or false) and thus are distinguishable from

7. This logical point about "declarations" applies with equal force to all performatives. See J. AUSTIN, *Performative Utterances*, in *PHILOSOPHICAL PAPERS* 233, 237 (3d ed. J. Urmson & G. Warnock 1979).

8. See p. 971 *supra*.

9. For an unembarrassed statement of this position, see C. STEVENSON, *FACTS AND VALUES* 10-31 (1963).

reports of personal feelings.¹⁰ Let us call those two theories the "emotivist" and the "assertion" theories of moral discourse. Each has an analogue in meta-theories about legal statements made by the courts. An emotivist theory of constitutional argument holds that if a judge says that the Constitution prohibits capital punishment, he or she is merely expressing a personal bias on the issue. Legal realism, as exemplified by the thought of Jerome Frank, adheres to this view, or to something close to it.¹¹ The legal version of the assertion theory, by contrast, holds that constitutional statements are claims that have a truth value. Judges can be right or wrong in claiming that the Constitution prohibits the death penalty.

These comparisons highlight an important difference between logical meta-theories of moral discourse and of legal discourse. Although we speak of courts and legislatures "declaring the law," we do not regard moral truth as something that can be declared. Declaring implies that the declarant cannot make a mistake. If the referee declares the runner out, the runner is out: it matters not whether the referee has made a bad call. If a court holds or declares a contract void, the contract is void: it matters not whether the judge has made a bad decision. Declarations are acts as well as statements: J.L. Austin dubbed them "performatives."¹² Their impact on the world derives from the authority of the declarant.

There are some matters about which no one has the authority to make declarations. No one has the authority to declare what is historically true, morally right, beautiful, or even efficient. These are matters that admit only of evidence and reasoned debate. They cannot be resolved by declaration.

The law is different. We assume that the law can be declared—that is, enacted or made. This is, at least, an acceptable meta-theory of legal statements. That moral truth cannot be declared in the same way marks an important difference between the meta-theories of legal statements and those of moral statements. In other respects, they run parallel. Both are sometimes characterized as purely emotive, subjective expressions of feeling. Both are sometimes treated as assertions

10. See, e.g., P. FOOT, *Moral Beliefs*, in *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 110 (1978); URMSON, *On Grading*, in *LOGIC AND LANGUAGE* (Second Series) 159 (A. Flew ed. 1961).

11. See J. FRANK, *LAW AND THE MODERN MIND* 32-33 (1930) (legal language as rationalization); *id.* at 119 (psychological factors bearing on judging).

12. J. AUSTIN, *supra* note 7, at 233-52.

of that which might be true or false. The following matrix summarizes these possibilities:

	The statement is:		
	purely emotive	an assertion	a declaration
moral statements	yes	yes	no
legal statements	yes	yes	yes

This scheme enables us to state the precise difference between positivist and nonpositivist theories of law. Legal positivism, as developed in the work of Hobbes,¹³ Bentham,¹⁴ Austin,¹⁵ Hart,¹⁶ and Raz,¹⁷ is a meta-theory about the statements that qualify as legally effective. The various nonpositivist or transcendent theories of law also lend themselves to characterization as meta-theories about legal discourse. Let us see why this admittedly novel approach to positivism and its alternatives proves to be more illuminating than the conventional approach to the subject.

Two things recur in the Anglo-American literature on legal positivism. Many legal scholars, including Hart,¹⁸ Fuller,¹⁹ and Richards,²⁰ emphasize the relationship between law and morality in defining the conflict between positivism and its alternatives. These scholars write that what characterizes positivists is their belief that law and morality are distinct; nonpositivists believe that there is some necessary connection between the status of a rule of law and its intrinsic moral value.²¹ Other scholars, particularly Dworkin²² and Raz,²³ emphasize

13. See T. HOBBS, *LEVIATHAN* ch. 26, at 137 (London 1651) (defining "civil law" as the command of the sovereign); pp. 982-83 *infra* (Hobbes on the "common law").

14. J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 301-11 (J. Burns & H.L.A. Hart eds. 1970) (1st ed. London 1789).

15. J. AUSTIN, *The Province of Jurisprudence Determined*, in 1 *LECTURES ON JURISPRUDENCE* 1, 1-25 (London 1861) (1st ed. London 1832).

16. H.L.A. HART, *THE CONCEPT OF LAW* (1961).

17. J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* (2d ed. 1980).

18. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 601 n.25 (1958) (listing five traits of legal positivism, including separation of law and morals).

19. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 631-32 (1958).

20. D. RICHARDS, *THE MORAL CRITICISM OF LAW* 22-26 (1977) (treating Hart-Fuller exchange as guide to current state of debate about positivism).

21. See Fuller, *supra* note 19, at 655-66 (whether statute merits description as "law" and whether it is binding on judges should be one question).

22. See R. DWORKIN, *supra* note 5, at 17 (positivist conception of law stresses "pedigree" of rules).

23. See J. RAZ, *THE AUTHORITY OF LAW* 37, 39-45 (1979) (positivism takes law to be "a matter of social fact").

a second aspect of positivism. They stress the problem of determining whether a particular rule is or is not a valid rule of the legal system. From this latter perspective, the positivist agenda requires a test for definitively determining whether a particular rule does or does not have force in the legal system.²⁴ The contrasting meta-theory of law acknowledges that there may be principles and policies that hover indecisively at the borders of the system, so that it may not always be possible to determine precisely which rules, principles, and policies belong to the system and which do not.²⁵

The first perspective on the problem—the separation of law and morals—derives logically from the latter positivist concern that the asserted existence of a rule of law be subject to formal verification.²⁶ The assumption of positivist thinkers seems to be that if morality and law were interwoven, there would be no way to devise procedures to determine the legal status of morally controversial rules. That is, if morally bad rules were not “law,” then we could not readily determine what was law and what was not. Every rule might be subject to moral controversy. Because we could not resolve the moral disputes, we could not determine objectively which rules had legal force. This is precisely the kind of indeterminacy in the concept of law that positivists seek to avoid.²⁷

Positivists have devised a variety of tests for verifying whether a given rule is valid in the system. The earlier emphasis on the “command of the sovereign”²⁸ has given way to the current view that the

24. This methodological assumption comes through clearly in Kelsen's “pure theory of law.” See H. Kelsen, *DIE REINE RECHTSLEHRE* (2d ed. 1961). The purity of the theory derives from its emulating the methods of logic and of the natural sciences. See K. Larenz, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 78-79 (4th ed. 1979) (Kelsen's positivist theory of law can only be understood by “taking the positive conception of science as the point of departure”). The positivist conception of science, like the pure theory of law, stands squarely against unverifiable, metaphysical arguments. See H. Kelsen, *supra*, at 80 (similarity exists between natural science and pure theory of law). In *The Concept of Law*, H.L.A. Hart minimizes this aspect of Kelsen's positivism. By contrast, Joseph Raz draws our attention to it. See J. Raz, *supra* note 23, at 130-32 (discussing Kelsen's methodology).

25. This point is at the heart of Dworkin's strategy for showing that neither Hart's rule of recognition nor any other “master rule” can provide a formal test determining the content of a particular legal system. See R. Dworkin, *supra* note 5, at 39-41.

26. The term “formal verification” is designed to elicit the methodological connection between legal and logical positivism. On the logical positivists' “verifiability theory of meaning,” see H. Reichenbach, *THE RISE OF SCIENTIFIC PHILOSOPHY* 256-57 (1951). Verification in legal positivism is carried out through the use of formal tests for determining legal validity. See p. 977 *infra*.

27. See H. Kelsen, *supra* note 24, at 68-69 (injection of moral criteria into notion of validity would render rules valid with regard to some moral systems, invalid with regard to others).

28. See, e.g., J. Austin, *supra* note 15, at 169-72; J. Bentham, *supra* note 14, at 301-02; T. Hobbes, *supra* note 13, ch. 26, at 137.

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legal system consists of rules, and perhaps of policies and other standards, whose status is determined by purely formal criteria²⁹—by their “pedigree,” as Dworkin puts it.³⁰ These formal criteria identify the agencies that can declare that particular rules or other standards are the law.

For present purposes, it is not important whether the rules in a particular legal system authorize only the legislature to enact the law, or whether in light of constitutional practice, the rules also identify courts as law-declaring agencies. The important point for the positivist thesis is that every legal system has a finite set of rules that determines who can make, enact, or declare the law. It follows that we can properly treat positivism as a meta-theory about who can make legally effective, first-order statements.

The positivist meta-theory also holds that these first-order statements are by their nature declarations rather than assertions about what the law is. This second tenet of positivism, like the first, follows from the methodological assumption that the asserted existence of the legal status of any legal rule be subject to verification:³¹ a proposition’s status as law cannot be indeterminate. If there are irresolvable disputes about what the law is, the positivist program collapses. To avoid this breakdown, the positivist must insist that the authorized agencies do not assert what the law is; they enact or declare the law.

Unlike positivism, transcendent meta-theories of legal discourse require, at least, that judicial statements of the law be treated not as declarations but as assertions of what the law is. Characterizing legal statements as assertions implies that there is some law about which the court might be mistaken. Yet the body of law at issue is not written. It is neither enacted by the legislature nor declared by the courts. It consists of principles and policies that become the objects of assertions and debate. That judicial holdings are assertions of the law constitutes the basic tenet of transcendent theories of law. These theories, expressed in various ways by Coke,³² Blackstone,³³ Fuller,³⁴

29. H.L.A. HART, *supra* note 16, at 97-107; H. KELSEN, *supra* note 24, at 9-11.

30. See R. DWORKIN, *supra* note 5, at 17.

31. See notes 24 & 26 *supra*.

32. See *Dr. Bonham's Case*, 77 Eng. Rep. 638, 652 (C.P. 1610) (Coke, C.J.) (statute void as violation of “common right and reason”). See also pp. 982-83 *infra* (discussion of Hobbes's critique of Coke).

33. 1 W. BLACKSTONE, COMMENTARIES *71 (in rendering a decision, “the judge may mistake the law”; further, “decisions of courts of justice are the evidence of what is common law” (emphasis in original)).

34. Fuller, *supra* note 19, at 661-69.

and Dworkin,³⁵ are properly called transcendent for they all presuppose a body of law that transcends the positive (enacted) legal sources.

Against the background of these distinctions, we can restate Dworkin's important thesis about the relevance of legal principles in a way that does not invite the misreading that his work typically incurs, and perhaps encourages. The distinction between rules and principles is not a matter of relative specificity, rules being precise and principles relatively imprecise. Although some of Dworkin's language infelicitously suggests this interpretation,³⁶ his better point lies elsewhere. The significant characteristic of principles is that they come to bear on a legal decision only as a result of a judge's asserting that the principle exists and that it has a particular weight in the circumstances of the case.³⁷ Principles and their weights in particular contexts are not "declared." No authoritative body informs judges how much weight they should accord the principle, say, that we should never punish an innocent person. This principle might call for one measure of weight in defining the scope of insanity—an issue that bears on guilt and innocence.³⁸ Yet the same aversion to punishing the innocent might call for a different weight in allocating the burden of persuasion on various other issues that bear on a defendant's guilt or innocence.³⁹ Knowing the language of the principle—"it is unjust to punish an innocent person"—does not tell us how much weight to accord it in particular situations.

Rules are different, Dworkin argues, because they are either "valid" or "invalid."⁴⁰ We are compelled either to accept the "answer [a rule] supplies"⁴¹ or to ignore the rule altogether. The force of a rule is not a matter of weight or degree; it is an "all or nothing" matter.⁴² Dworkin's point here is not that rules mechanically entail results in particular cases, but rather that the "logical"⁴³ status of the rule is categorical. Either it binds us or it does not. The rule might be binding, but nonetheless vague. The "answer" it supplies might not in fact resolve the case at hand, but it would nonetheless be an "answer" in this sense.⁴⁴

35. R. DWORKIN, *supra* note 5, at 22-31.

36. *E.g.*, *id.* at 35 ("Only rules dictate results, come what may.")

37. *Id.* at 26-27 (part of "concept of a principle . . . [is] that it makes sense to ask how important or how weighty it is").

38. *See* G. FLETCHER, *RETHINKING CRIMINAL LAW* 835-46 (1978).

39. *Id.* at 539-41 (insanity); *id.* at 546-48 (lesser evils in German euthanasia case).

40. R. DWORKIN, *supra* note 5, at 24.

41. *Id.*

42. *Id.*

43. *Id.* (distinction between rules and principles is "logical").

44. *But cf. id.* at 35 ("Only rules dictate results, come what may.") Dworkin's argument

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The notion of first-order legal statements helps us understand Dworkin's point in distinguishing rules from principles. Rules are valid because they are declared (by the legislature or the courts) to be valid. In stating the rules applicable to the case at hand, a judge need make no assertions about higher bodies of law. She merely states the "valid" or "authoritative" rule; in so doing, she makes a descriptive statement about some other agency's effective first-order declaration of the rule. In contrast, the judge's invocation of principles entails more than a description of determinable and authoritative sources. She must fathom the weight of the principle in the particular case. This process of gauging the force of the principle requires a first-order legal statement in the form of an assertion of what the law is. Thus, Dworkin's jurisprudence should be seen as a meta-theory of judicial discourse. If judges state and apply rules as well as bring to bear principles, then their discourse consists of descriptive statements about the rules as well as first-order assertions about the principles.

First-order statements about principles represent assertions about the law, yet the "law" in this sense transcends both enacted rules and rules accepted as customary law. We lack appropriate words in English to distinguish between law that is enacted or declared (that is, statutes and cases), on the one hand, and the body of law that includes unenacted principles, on the other. We are linguistically embarrassed in writing both about the Constitution and generally about the law. As a result, we operate with at least two senses of the words "Constitution" and "law." In one sense, the Constitution is the set of ordered words written in 1787 and formally amended twenty-six times. In another sense, the "Constitution" is that body of supreme law that includes, for example, principles of substantive due process.⁴⁵ Similarly, "law" is used sometimes to refer just to enacted legal sources and in other contexts to include the unwritten principles that judges assess and expound in reaching decisions. Our language does not capture the distinction between these two senses of law. Because the distinction is critical to the overall argument of this paper, however, it is worth examining the more refined treatment that the distinction has received in civilian legal systems.

unfortunately interweaves two issues of "determinability." The first is the problem that concerns positivists seeking to develop formal approaches to the status of legal rules. See note 24 *supra*. The other is the problem of determining the outcome of particular cases. Dworkin's position is that principles are not determined in the first sense, R. DWORKIN, *supra* note 5, at 26-27, but that "a set of principles *can* dictate a result," *id.* at 35 (emphasis in original).

45. See Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689, 713 (1976) (Constitution in this higher sense is the "organic" constitution).

III. Two Concepts of Law

All of the prominent Continental European languages employ two words for law. One refers exclusively to enacted law and other rules that lend themselves to definitive specification: *Gesetz*, *loi*, *ley*, *zakon*, *törvény*. Another refers to law in the broader sense that includes un-enacted principles: *Recht*, *droit*, *derecho*, *prava*, *jog*. Each of these dimensions of law requires elaboration.

Taking the German terms as exemplary, we should first note the diversity of contexts in which we would translate "law" as *Gesetz*. Both statutory law and scientific laws are *Gesetze* (in the plural). Significantly, Kant used the term *Gesetz* in defining the categorical imperative: the actor must be able to will the maxim of his action to be a universal *Gesetz*.⁴⁶ It is not surprising, then, that German theorists also regard customary laws as *Gesetze*.⁴⁷ These are all instances of laws that lend themselves to validation or refutation. We can know precisely what the statutes say, which scientific laws are adequately supported by the data, what the form of the universalized maxim would be, and which customs are treated as binding customary law. Positivists have no trouble recognizing law as *Gesetz*. Indeed, this form of law is the positivist paradigm.

The concept of *Recht* is more elusive. We have no counterpart in contemporary English. The term is used in the following ways. First, the entire law of a culture is its *Recht*. Thus one says: *deutsches Recht*, *le droit français*. Second, particular bodies of law are identified as dimensions of *Recht*: for example, *Strafrecht* (criminal law), *Verfassungsrecht* (constitutional law). The codes that generate these bodies of law are always described as *Gesetze*, but the law generated by the code is a form of *Recht*. Third, the term "law" is translated as *Recht* in jurisprudential phrases such as "sources of law"⁴⁸ and "the rule of law."⁴⁹ Fourth, philosophical work on the law is always about the concept of *Recht*. For example, Kant worked out his legal theory in

46. I. KANT, *GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN* 421 (1785); I. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 44 (L. Beck trans. 1969).

47. See, e.g., 4 W. FIKENTSCHER, *METHODEN DES RECHTS* 328 (1977).

48. *Rechtsquelle* in German. The English term might mislead one to think that the study of these "sources" is a sociological inquiry rather than one about the factors that properly influence judgments of law. See H.L.A. HART, *supra* note 16, at 246-47.

49. The closest term in German is *Rechtsstaat*, which suggests not only the governance of rules but a commitment to the substantive values of *Recht*. See, e.g., M. MARK, *ZUR DEFINITION DES BEGRIFFS "RECHTSGUT"* 14-16 (1972); G. RADBRUCH, *RECHTSPHILOSOPHIE* 284-90 (6th ed. E. Wolf 1963).

the *Rechtslehre*.⁵⁰ Hart's *The Concept of Law* is translated as a work about the concept of *Recht*.⁵¹ In none of these four contexts would we use any word in English but "law."

In virtually all Western languages, the same word *Recht* refers both to law in the broader sense and to individual rights. Thus, German theorists distinguish between objective *Recht* and subjective *Rechte* (in the plural).⁵² This suggests that an appropriate translation for *Recht* would be "Right," for at least in the context of personal rights, our idiom corresponds with the continental pattern. The word "Right" will serve us well as the English equivalent of *Recht*. Yet we should not forget that in most situations the term *Recht* is translated literally as "law."

The Right encompasses not only written and customary *Gesetze*, but the unwritten principles and policies that come to the fore only as a result of assessment, judgment, and judicial assertion. The Right includes personal rights, those based on statute and those asserted as a matter of principle. Significantly, however, the Right also includes duties.⁵³ For example, the German legal duty to rescue a person in distress⁵⁴ is imposed as a matter of Right.

The concept of Right intersects the notions of justice and morality, but is distinguishable from both. Radbruch defines the Right as that dimension of law, realized in a particular cultural context, "whose meaning consists in the pursuit of justice."⁵⁵ This account by Radbruch helps us understand the peculiar way in which the concept of Right mediates between the particularities of the legal culture and the universal idea of justice. The Right is crystallized in the work of legislatures and courts. Yet, as Radbruch argues, the "sense" of this work consists in the pursuit of justice.

The critical distinction between the two dimensions of law lies in their relative knowability. *Gesetze* are fully knowable. They are finite and, in this sense, fully determinable. They conceal no mysteries. The

50. The *Rechtslehre* appears as the first half (first volume) of I. KANT, *DIE METAPHYSIK DER SITTEN* (Königsberg 1797). For an approximate translation, see I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (J. Ladd trans. 1965), which infelicitously renders *Recht* as "justice."

51. H.L.A. HART, *DER BEGRIFF DES RECHTS* (A. von Bayer trans. 1973).

52. I ENNECERUS-NIPPERDEY, *ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS* 428-29 (15th ed. 1959).

53. See J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 209 (1980) (perceptively elucidating the role of duties in the concept of *jura*, the Roman equivalent to the concept of Right).

54. *STRAFGESETZBUCH [StGB] § 13 (W. Ger.)*.

55. G. RADBRUCH, *supra* note 49, at 127 ("Recht [ist]/die Wirklichkeit, die den Sinn hat, der Gerechtigkeit zu dienen").

Right, on the other hand, is open-ended, transcendent, undetermined. It can never be fully known. We can assert the truth about the Right, and even make a persuasive case for our position. A consensus might emerge for a particular conception of Right. But the consensus can be at most tentative. A better vision of the Right always remains possible.⁵⁶

The distinction between *Gesetz* and *Recht* corresponds to several distinctions we have already discussed. As *Gesetze*, statutes and case holdings are *declared*. The Right cannot be *declared*, but only assayed, pondered, and asserted. In Dworkin's terminology, rules that apply in "all or nothing" fashion⁵⁷ are *Gesetze*, whereas principles are a matter of Right. That principles have "weight" and that judges must gauge the force of these principles in every case are characteristics of the Right. No one can declare the principles' existence and determine the precise weight they should carry.

Because we have no clear concept of Right in English, the single word "law" does double duty. Until the time of Blackstone and after, the "common law" clearly had the connotation of law in the sense of Right.⁵⁸ At least since the seventeenth century, however, positivist philosophers have sought to equate the word "law" with enacted law (*Gesetze*). The conflict comes to the surface in Thomas Hobbes's masterful *A Dialogue Between a Philosopher and a Student of the Common Laws of England*.⁵⁹ The dialogue provided Hobbes with an opportunity to attack the views of the leading legal theorist of the seventeenth century, Sir Edward Coke. The debate centers on the meaning of the word "law."

Hobbes's student of the common law, who appears to be a stand-in for Coke,⁶⁰ argues that our understanding of the law is based on an "artificial perfection of Reason gotten by long Study, Observation and Experience."⁶¹ Thus, "the Law of *England* . . . hath been fined and refined by an infinite number of Grave and Learned Men."⁶² To this the philosopher, speaking for Hobbes, responds: "It is not Wisdom, but Authority that makes a Law [N]one can make a

56. That we cannot determine the Right does not imply that there is no "right" answer; that is, no truth in our claims of Right. On the difficulties of denying the reality of the Right, see Dworkin, *No Right Answer?* 53 N.Y.U. L. REV. 1 (1978).

57. See R. DWORKIN, *supra* note 5, at 24.

58. See notes 32 & 33 *supra*.

59. T. HOBBS, *A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* (J. Cropsey ed. 1971) (1st ed. London 1681).

60. *Id.* at 10-11 (introduction by J. Cropsey).

61. *Id.* at 55.

62. *Id.*

Law but he that hath the Legislative Power.”⁶³ The lawyer concludes that it is not the profession of grave and learned lawyers that has the power to legislate, but solely the sovereign, the King in Parliament, in which “not one of twenty was a Learned Lawyer.”⁶⁴ The lawyer responds by suggesting that the philosopher has missed the point: “You speak of the Statu[t]e Law, and I speak of the Common Law.”⁶⁵ The philosopher retorts: “I speak generally of Law.”⁶⁶

In this brief exchange we find encapsulated the moves that have recurred in the jurisprudential discussions of the last three hundred years. The lawyer expresses the view that the common law should be understood as a species of Right. This was in fact the view that Coke espoused in the *Institutes*⁶⁷ and in *Doctor Bonham's Case*.⁶⁸ The philosopher countered that the law is no more than statutory law—*Gesetze*. “It is not Wisdom, but Authority that makes a law.”⁶⁹ Thus the fictional philosopher captures the positivist position as succinctly as anyone who has played his part in the last three centuries.

The debate about the meaning of “law” continues in our time. H.L.A. Hart and other positivists represent the philosopher’s view that the applicable law is reducible to enacted statutes⁷⁰ and customary law.⁷¹ Fuller’s response to Hart holds, in effect, that the word “law” should be understood as the Right.⁷² Statutes must meet certain conditions of moral decency before they merit classification as law in this higher sense. Dworkin takes a different tack to strengthen the sense of Right in American jurisprudence. He asserts that contemporary American law includes principles as well as enacted rules.⁷³ These principles testify to the ongoing influence of the Right in our legal culture.

As long as the debate between positivist and transcendent legal theories turns on how we ought to use the word “law,” there seems to

63. *Id.* Lawyers commonly refer to “the law.” Note that the philosopher here refers to “a law.” That particular laws emanate from the legislature is easier to defend than the claim that all law has its origin in “authority.”

64. *Id.*

65. *Id.*

66. *Id.*

67. See E. COKE, *FIRST INSTITUTE* § 138, at 97v. (London 1628).

68. See *Dr. Bonham's Case*, 77 Eng. Rep. 638, 652 (C.P. 1610).

69. T. HOBBS, *supra* note 59, at 55.

70. See pp. 975-77 *supra*.

71. On the status of customary law, see H.L.A. HART, *supra* note 16, at 45-46 (rejecting view that custom cannot be source of law until so declared by courts); H. KELSEN, *supra* note 24, at 230-34 (same).

72. See Fuller, *supra* note 19, at 655-66. Fuller implicitly adopts Radbruch's conception of the Right. See p. 981 *supra*.

73. See pp. 978-79 *supra*.

be little hope of resolving the normative controversy.⁷⁴ Yet there might be an alternative strategy for refuting the positivist thesis. Dworkin's strategy is to shift our focus from the phenomenon of "law" in general to the argumentative style of lawyers and judges in the common law tradition. That participants in one system rely on principles and policies that transcend the enacted law, Dworkin argues, should count as evidence against the positivist conception of law.⁷⁵ The positivist response, it seems, should be to defend a general meta-theory that abstracts from the particularities of a single system.

IV. Two Modes of Legal Thought

To this point, the argument has followed the conventional jurisprudential pattern of analyzing the posture of judges in interpreting and applying the law. We have distinguished between the meta-theory that judicial pronouncements declare the law and the contrasting position that these pronouncements merely assert what the law is. The former position characterizes legal positivism; the latter view marks transcendent theories of law.

We can now trace the impact of these meta-theories on the aspirations of legal scholarship. Let us consider what scholars might do in a legal culture that assumed the existence of the Right as a dimension of the law and accordingly treated judicial and perhaps legislative statements as assertions rather than as declarations of the law. In a legal culture characterized by a vivid sense of the Right, scholars would presumably participate in the assertion, refinement, and teaching of particular conceptions of the Right. If judges asserted rather than declared what the law is, then surely scholars would have equal if not superior standing to participate in the process that Hobbes's lawyer called "fining and refining the law." This mode of legal thought is appropriately called "committed argument." Scholars would commit themselves to the pursuit and the articulation of the principles that constitute the law as the Right. They would engage in first-order substantive legal argument about the law. This argument would unite them in a dialogue with their colleagues, with judges of their time, and with the legal tradition.

Consider now the mode of scholarly thought that would emerge in

74. To summarize the debate: Hart argues that the word "law" should be equivalent to the German *Gesetz*; Fuller, that it should be equivalent to *Recht*, as understood by Radbruch. The debate thus appears to be an irresolvable dispute about the proper use of the word "law."

75. R. DWORKIN, *supra* note 5, at 22-45.

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a legal culture that took the tenets of positivism as its foundation. In this culture, everyone would assume that the law consisted exclusively of those rules declared to be the law by the authorized agencies—the legislature and perhaps the courts. It is hard to imagine a version of positivism in which scholars could declare or make law merely by writing an article. Scholars would be limited to describing the law as declared by the official agencies.⁷⁶

This posture of description generates a mode of thought appropriately called “detached observation.” The scholar is detached from the actual workings of the legal system. His task is to observe and report what he sees. In the mode of “detached observation,” scholars can engage in sophisticated analysis as well as the routine reporting of developments in the courts and legislature. The perspectives offered by the social sciences rescue the observing scholar from trivial commentary. In the posture of the scientist studying the law as a social system, the sophisticated observer makes an important contribution to legal scholarship.

The relationship between legal positivism and these two modes of legal thought bears careful articulation. To engage in committed argument, the scholar must believe that the law exists not only as enacted law (*Gesetze*) but as the Right (*Recht*). The law as Right, after all, is the object of the argument. This means that those who engage in committed argument implicitly subscribe to a transcendent theory of law. Those who refuse to acknowledge that the law transcends enacted legal rules cannot—as a conceptual matter—engage in committed argument. Positivists, therefore, are limited to the mode of detached observation.

The converse logical relationship, however, does not hold. Anyone can detach himself from the legal system and observe the behavior of legal officials. Though positivism precludes committed argument about the law, subscribing to a transcendent legal theory does not prevent detached observation.

There might be the following objection to this analysis.⁷⁷ It is true that positivist legal scholars cannot, as positivists, argue about

76. In addition to describing the law, scholars in a positivist legal culture could also exhort the officials to change the law, *see* pp. 986-87 *infra*, and predict what the officials might do. The latter represents Holmes's famous “predictive” conception of law. *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”)

77. Professor Barbara Underwood raised this point in her comment on the lecture based on this paper, given at the symposium on February 13, 1981.

the law in the higher sense of Right, but they can argue about what the enacted law ought to be. They can commit themselves to reforming the law, through either the courts or the legislatures. Indeed, the facilitation of law reform provides one of the more persuasive arguments for the limited, positivist conception of law. If the law is enacted, then it also can be changed. As a leading positivist, Bentham was also a committed reformer.

All this is true. Yet there is a significant difference between arguing about the content of the law (as Right) and arguing about what the law ought to be. First, judges are bound by the law—both in West Germany and in the United States. Yet, in neither country are they bound by scholarly claims of what the law ought to be. The West German Basic Law (Constitution) makes it clear that the “law” that binds the judges includes not only the enacted law but also principles of Right.⁷⁸ Therefore, in asserting conceptions of the Right, German scholars engage in discourse about the criteria that in fact bind the courts. This does not mean that judges follow the opinions of scholars, as they follow legislative directives. Yet being bound by the Right means that if they concede that a particular position is Right, they are obligated to follow it.⁷⁹ In contrast, in a legal system founded on positivism, judges would not be bound by the scholars’ conception of good law or sound policy. The judges might well concede that the scholars’ recommendations are morally right, but nonetheless could maintain that it is up to the legislature to change the law.⁸⁰

In addition, the effort to elaborate the Right generates a literature that differs from the overt advocacy of law reform. The pursuit of immanent principles leads to an emphasis on the internal structure of the law, expressed both in the structure of the codes and in historical evolution. In the last two sections of this article, I shall illustrate the mode of committed argument with instances of scholarly work on matters of structure and principle. The mode of arguing what the law ought to be, as expressed, say, in the work of Bentham, hardly imitates these features of committed argument. The last thing the legislative reformer would do is stress the authority of history.

78. GRUNDGESETZ [GG] art. 20(III) (“*die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden*”); cf. *id.* art. 97(1) (judges are “independent and subject only to Gesetz” (“*nur dem Gesetz unterworfen*”)).

79. Dworkin develops a similar argument about the effect of principles on judicial obligation. See R. DWORKIN, *supra* note 5, at 35 (“[i]f a judge believes that principles he is bound to recognize point in one direction . . . then he must decide accordingly”). From this premise, Dworkin reasons that principles may “dictate a result.” *Id.* at 35.

80. I am indebted to Guyora Binder for helping me formulate this response.

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He would seek to counter, rather than to cultivate, the argument that basic principles inhere in the law as it has evolved. In fact, as H.L.A. Hart has stressed, the positivist advocacy of law reform is linked closely to the emergence of utilitarianism as a moral philosophy.⁸¹ With a commitment to promoting future welfare, utilitarians see little point in arguments of principle based on the accrued legal materials.

V. Examples of Committed Argument in Common Law and Civilian Systems

The two modes of thought are stated here as ideal types.⁸² They are methodological constructs that enable us to order and to interpret the complicated flux of experience. In a conflicted legal culture, such as our own, it might be difficult to determine whether particular authors are engaged in the mode of committed argument or are merely describing the authoritative materials. As a matter of style, for example, common-law scholars might prefer to camouflage their normative purposes in descriptive syntheses of the cases or in historical claims about legislative intent. Precisely because the data are unamenable to easy classification, these ideal types enable us to make some useful historical and comparative claims about the relative prominence of the two modes of legal thought.

It is safe to assert that at least until the beginning of the nineteenth century, English legal scholarship was devoted almost entirely to committed argument about the basic principles of the common law. Consider the development of the criminal law. Without the sustained efforts of scholars such as Coke,⁸³ Hale,⁸⁴ and Blackstone,⁸⁵ the common law of crime would not have taken shape. The scholars did occasionally cite cases, but the significance and meaning of the cited cases depended not on the language of the reported opinions, but on the interpretation the opinions received in the scholarly literature.⁸⁶ In our time, we still encounter committed arguments, sometimes explicit and sometimes camouflaged, about substantive

81. Hart, *supra* note 18, at 601.

82. See pp. 1001-03 *infra* (describing the methodology of ideal types).

83. E. COKE, *THIRD INSTITUTE* (London 1644).

84. M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* (London 1736).

85. 4 W. BLACKSTONE, *supra* note 33.

86. For a discussion of the conflicting interpretations of the important *Carrier's Case*, Y.B. Pasch. 13 Edw. 4, f. 9, pl. 5 (1473), reprinted in 64 SELDEN Soc'y 30 (1945), see G. FLETCHER, *supra* note 38, at 66-70, 97-98, and Fletcher, *Manifest Criminality, Criminal Intent, and the Metamorphosis of Lloyd Weinreb*, 90 YALE L.J. 319, 328-32 (1980). See also 4 W. BLACKSTONE, *supra* note 33, at *201 (analysis of burden of persuasion in criminal cases discussing *Oneby's Case*, 92 Eng. Rep. 465 (K.B. 1727)).

due process,⁸⁷ about cruel and unusual punishment,⁸⁸ and about the First Amendment.⁸⁹ The ongoing debate about tort liability seems to be conducted sometimes in the mode of committed argument,⁹⁰ sometimes as an exchange about what the law ought to be.⁹¹ Alongside these examples of committed argument in the current American literature, the last few decades have witnessed an obvious awakening of sophisticated writing in the mode of detached observation. The campaign in our leading law schools to treat the law as a social science reflects the powerful influence of interdisciplinary observation as a model of legal scholarship.

The contrast between these modes of legal thought helps us focus on the special sense of "legal science" in civilian legal cultures. Given our current equation of "science" with "natural science," we might be inclined to believe that civilians think of "legal science" as a form of detached observation, a mode of scientific analysis of legal data. This translation falls wide of the mark. In many languages, the term for "science" has a broader meaning than the current English word. The German term *Wissenschaft* encompasses both natural science and *Geisteswissenschaften*, that is, humanistic disciplines, such as history and social theory. The humanistic sense of *Wissenschaft* finds expression in the term *Rechtswissenschaft*, or "legal science."⁹² This translation is awkward because we no longer have an appropriate word in English to describe the kind of knowledge that scholars acquire by searching for structure and meaning in the legal materials. The phrase "humanistic understanding" might be as close as we

87. E.g., Perry, *supra* note 45, at 694 (restrictions on abortion violate the "inherent" limit on state's legislative authority under police power).

88. For efforts to construe the Eighth Amendment as more hostile to the death penalty than the courts have held, see Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970), and Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1042-52 (1978).

89. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 16-17 (1963).

90. The best example is the development of the right of privacy, both prior to legislative and judicial recognition, Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 204-13 (1890) (protection of privacy underlies diverse bodies of law), and today, when the effort is to elicit the principles reflected in the decided cases, W. PROSSER, HANDBOOK OF THE LAW OF TORTS 804-15 (4th ed. 1971) (arguing that privacy cases express four rationalia for recovery).

91. The most influential current critique of existing practice is Epstein's proposal. See R. EPSTEIN, A THEORY OF STRICT LIABILITY: TOWARD A REFORMULATION OF TORT LAW (1980).

92. Though I regard this claim as the prevailing view in Germany today, the point is difficult to establish. For a view close to my own, see K. LARENZ, *supra* note 24, at 165-92 (emphasizing heuristic dimension in *Jurisprudenz* as branch of *Rechtswissenschaft*).

can get to the German idea of *Geisteswissenschaft*, or "science-of-the-spirit."⁹³

Although sophisticated forms of detached observation might qualify as empirical "science," the mode of committed argument generates an equally sound form of humanistic understanding. The understanding derives from the scholar's personal commitment to the pursuit and from the ensuing dialogue with other committed participants. Admittedly, the notion of humanistic understanding requires a critical exposition that exceeds my own present learning.⁹⁴ The most I can hope to do in this article is highlight some features of a legal culture characterized by the mode of committed argument.

The concept of *Lehre* plays a central role in a legal culture dominated by committed argument. Literally, the term *Lehre* means "teaching," but we think only of religious figures as "teachers" in this sense. The best way to grasp what Germans mean by a *Lehre* is to think of the way we use the term "theory" ubiquitously to refer to nonscientific as well as scientific arguments. Epstein's *A Theory of Strict Liability*⁹⁵ or Rawls's *A Theory of Justice*⁹⁶ would be appropriately translated into German as *Lehren*.⁹⁷ These works are assertions about the basic principles of tort law and of justice. They cannot be proved or disproved. They succeed so far as they speak effectively to those concerned about the same issues.⁹⁸

Humanistic legal "theories" (*Lehren*) come and go. For those that gain a following and become dominant, the Germans reserve the special term *herrschende Lehre*, or "ruling theory." Whether a theory becomes dominant in this sense depends on its substantive merit. The reputations and status of those who urge the theory obviously affect the likelihood of the theory's acceptance. Those that become dominant often find their way into legal opinions and statutory reforms

93. This problem of translation is ironic. Apparently, the German term was coined in order to translate the English term "moral science." See G. VON WRIGHT, *EXPLANATION AND UNDERSTANDING* 6 (1971).

94. The texts with which to begin a deeper study would be W. DILTHEY, *EINLEITUNG IN DIE GEISTESWISSENSCHAFTEN* (1883), and H. RICKERT, *DIE GRENZEN DER NATURWISSENSCHAFTLICHEN BEGRIFFSBILDUNG* (1913).

95. R. EPSTEIN, *supra* note 91.

96. J. RAWLS, *supra* note 5.

97. Rawls's translator in fact used the term *Theorie*, which looks more like the English term. J. RAWLS, *EINE THEORIE DER GERECHTIGKEIT* (H. Vetter trans. 1975). The meaning of *Theorie* in German is more restricted. See pp. 990-91 *infra*.

98. For a poignant statement of this position, see J. RAWLS, *supra* note 5, at 50 ("So for the purposes of this book, the views of the reader and the author are the only ones that count.")

and thus bear directly on the exercise of judicial and legislative power.⁹⁹

We should note the connection between "legal theories" (*Lehren*) and some of the other terms we have used in this exposition. These theories are assertions of Right. Judges are bound by the Right, and therefore they must pay careful attention to those theories that become dominant in the literature. The Swiss civil code testifies to the impact of legal theories on the legal process. The first section of the code provides that if the code fails to resolve a legal dispute, the judge should act as though he "were a legislator" in fashioning an appropriate rule.¹⁰⁰ The second half of the provision curtails this grant of legislative freedom: the judge is required to follow "customary law" and "those theories that have stood the test of time" (*bewährte Lehren*).¹⁰¹ Thus the Swiss judge assesses the leading scholarly theories and attempts to gauge their substantive merit.

Humanistic legal "teachings" address a wide range of problems. Some seek to explicate the underlying structure of issues bearing on liability. A good example is the German theory that classifies the issues of substantive criminal law as matters of definition, wrongdoing, and culpability.¹⁰² Others seek to explicate basic concepts used in legal analysis.¹⁰³ More specific "teachings," usually called *Theorien* in German, are directed to the solution of particular legal problems, such as impossible attempts¹⁰⁴ and mistaken self-defense.¹⁰⁵

In the remaining sections of the article I shall offer some suggestions about the criteria that render "theories" and claims of Right persuasive in Western legal cultures. These suggestions are tentative. They derive from reflection about a few instances in which scholars have sought to cull claims of Right from the available legal materials.

99. One good example is the exhaustive discussion of competing "teachings" on mistake of law in the Judgment of Mar. 18, 1952, Bundesgerichtshof, W. Ger., 2 Bundesgerichtshof in Strafsachen [BGHSt] 194. The court sets forth two competing theories, as developed in the literature, and then explains why it chooses the one that it does. *Id.* at 205-11.

100. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] § 1(2) (Switz.).

101. *Id.* § 1(3) (French version says that judge "*s'inspire des solutions consacrées par la doctrine et la jurisprudence*").

102. This development of this structure and its implications is known as the *Verbrechenslehre*. See G. FLETCHER, *supra* note 38, at 406-08.

103. Welzel's *Finale Handlungslehre* ("teleological theory of acting") seeks to clarify the nature of the human conduct relevant to the criminal law. See G. FLETCHER, *supra* note 38, at 433-48. The theory is treated as important in itself, regardless of whether it affects the outcome of concrete cases.

104. H. JESCHECK, *LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL* 429-30 (3d ed. 1977) (discussion of "objective theory" and "subjective theory" of liability).

105. *Id.* at 375 (discussion of various theories on the proper classification of the mistaken belief that one is under attack).

VI. Committed Argument: From Statutes to Principles

As a general matter, claims of Right are likely to be persuasive only insofar as they build on legal materials generally recognized as authoritative in the legal culture. A personal and idiosyncratic vision of the Right might be prophetic, but it is not likely to gain support among others who might indulge, as well, in a private view of the Right. The common materials that ground a claim of Right in shared experience are, as one might expect, statutes and cases. Yet there are some important assumptions that we must make about statutes and prior decisions in order to use them effectively to render a claim of Right persuasive.

In order to explicate these assumptions, I shall examine two common techniques of argument in German private law. If a single provision is extended to an analogous situation clearly not covered by the language of the provision, the rationale of the extension is called *Gesetzesanalogie*; that is, analogy based on a statutory provision.¹⁰⁶ If several specific provisions are taken to stand for a single underlying principle, the rationale for the generalized principle is called *Rechtsanalogie*; that is, analogy as a matter of Right.¹⁰⁷ Both of these analogical arguments are efforts to muster the authority of the code as support for a principle of Right.

For a good example of analogical extension from a single provision, consider the 1958 case of the "Horseman,"¹⁰⁸ in which the German Supreme Court extended a statutory provision for damages to the newly recognized tort of invasion of privacy.¹⁰⁹ The defendant had, without the plaintiff's permission, published a picture of the plaintiff riding a horse in an advertisement for a product generally thought to heighten sexual potency. The advertisement, with its not-so-subtle allusion to the plaintiff's "riding" capacities, allegedly held him up to ridicule. There was little doubt that this publication constituted a wrongful violation of the plaintiff's privacy; yet the plaintiff had suffered no material damage, and section 847 of the Civil Code seems to bar the payment of damages for nonmaterial injuries in privacy cases. The section explicitly limits this form of recovery, as well as

106. See I(1) ENNECERUS-NIPPERDEY, *supra* note 52, at 339-40.

107. See *id.*

108. Judgment of Feb. 14, 1958, Bundesgerichtshof, W. Ger., 26 Bundesgerichtshof in Zivilsachen [BGHZ] 349.

109. The tort was developed by interpretation of the residual clause "or any other right," which defines the scope of protected interests under the general tort provision. BÜRGERLICHES GESETZBUCH [BGB] § 823 (W. Ger.); see Judgment of Apr. 2, 1957, Bundesgerichtshof, W. Ger., 24 BGHZ 72.

damages for pain and suffering, to cases of physical injury, wrongful death, and the "deprivation of liberty."¹¹⁰ Unless privacy proved to be a form of liberty, the plaintiff could not recover under the terms of the code. It is fairly clear that the term "deprivation of liberty" was conceived originally to apply to cases of tortious false imprisonment.¹¹¹ Yet the Supreme Court reasoned that by analogical extension, the term should apply to other forms of liberty, and in particular, to the liberty to sell or withhold one's picture from publication. Significantly, the Court did not rely on a fictitious construction of legislative purpose. Its primary argument was that in light of the proper development of the right to privacy since the enactment of the Code, it would represent "unacceptable contempt of this [newly-recognized] right"¹¹² to limit section 847 to its original purpose and to refuse a remedy in privacy cases. This argument extending section 847 had already gained acceptance as a scholarly theory or "teaching," and the Court relied heavily on scholarly theory in defending its analogical expansion of the law.¹¹³

Inferring basic principles from several code provisions has had an even more dramatic history in the development of German private law in this century. Shortly after the Civil Code came into force in 1900, Professor Staub noted that the Civil Code lacked, as it still does, a provision to cover simple cases of improper contractual performance leading to consequential harm—for example, delivering a diseased horse and thus infecting the rest of the buyer's stable.¹¹⁴ The Code had no general provision on contractual breach, but rather two specific forms of "contractual breakdown."¹¹⁵ Staub argued that these

110. See BGB § 847.

111. Section 832(1) of the BGB explicitly protects "liberty" (*Freiheit*) from intentional and negligent deprivations. If in the cases cited above, see note 109 *supra*, the courts had thought of the violation of privacy as the "deprivation of liberty," they would not have developed the new tort under the residual clause, "or any other right."

112. Judgment of Feb. 14, 1958, Bundesgerichtshof, W. Ger., 26 BGHZ 349, 356.

113. See *id.* (even before enactment of the new constitution in 1949, many writers had argued in favor of extending BGB § 847; new constitution commits itself to values that support extension). This case and the law it represents eventually generated a constitutional dispute. In its Judgment of Feb. 14, 1973, 34 Bundesverfassungsgericht [BVerfGE] 269, the Federal Constitutional Court held that because judges were bound by "*Gesetz und Recht*," GG art. 20(3), the expansion of BGB § 847 reflected a constitutionally permissible judicial function. See 34 BVerfGE at 286-88. Accordingly, the Court concluded, the judicially developed law on the remedies for breach of privacy constituted the type of "*allgemeines Gesetz*" necessary for a restriction on the freedom of the press under GG art. 5(11). 34 BVerfGE at 292.

114. H. STAUB, *DIE POSITIVE VERTRAGSVERLETZUNG* (1904). According to the foreword to this edition, the argument was originally advanced in a paper presented in September 1902. *Id.* at 2-3. The Civil Code came into force on January 1, 1900.

115. BGB §§ 284-286 ("delay" in performance); *id.* § 280 (impossibility of performance).

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specific forms of breakdown reflected a general principle of liability for contractual breach.¹¹⁶ Eventually adopted by the courts, Staub's theory of "affirmative breach of contract" has become an established institution in the German law of contracts.¹¹⁷ That the doctrine has never received statutory embodiment has no bearing on its binding force.¹¹⁸

For another good example of inferring a general principle from specific statutory provisions, consider the general recognition of injunctions as a remedy for threatened wrongs. The Civil Code refers to the possibility of a preventive injunction in only three provisions. It could be argued that these three references were intended to exhaust the cases of permissible injunctions, but the contrasting claim of Right has prevailed: the three references are taken to be but the surface manifestations of a general principle permitting injunction as a supplementary remedy in all cases of threatened harm.¹¹⁹

Several points about analogical argument are worth stressing. First, these claims do not represent interpretations of vague statutory provisions. Nor do the proponents of the arguments seek to camouflage their assertions of Right with fictions¹²⁰ or contrived arguments about legislative purpose. Further, both scholars and judges make these claims of Right, which transcend the enacted law. In the German tradition, at least, scholars often initiate new developments by first refining a new theory in the literature.¹²¹ Even though they might expect the courts to follow their teaching, German scholars occasionally have held to their view of the law even though the courts consistently disagreed.¹²²

116. See H. STAUB, *supra* note 114, at 21-23 (referring explicitly to argument by analogy).

117. O. PALANDT, *BÜRGERLICHES GESETZBUCH* 294-98 (39th ed. 1980); W. FIKENTSCHER, *SCHULDRECHT* 249 (1969); see Judgment of Nov. 13, 1953, Bundesgerichtshof, W. Ger., 11 BGHZ 80, 89 (positive breach of contract is an established rule).

118. BGB § 12 (misuse of another's name); *id.* § 862 (interference with possession); *id.* § 1004 (interference with owner's rights). All three of these provisions use the set formula: "If further disturbances are feared, the affected party can sue for injunctive relief."

119. O. PALANDT, *supra* note 117, at 197.

120. Staub's argument provides a striking example. It might have been possible to solve the problem of affirmative breach by reasoning that the temporary breach rendered the proper performance "impossible" in the sense required by BGB § 280. Yet Staub preferred to assert a principle by analogy rather than engage in this kind of manipulation of the Code's language. See H. STAUB, *supra* note 114, at 10-11.

121. Two striking examples in the criminal law are the development of extra-statutory necessity as a justification, see Judgment of Mar. 11, 1927, Reichsgericht, W. Ger., 61 Reichsgericht in Strafsachen [RGSt] 242; G. FLETCHER, *supra* note 38, at 777-84, and the development of mistake of law as an excuse, see Judgment of Mar. 18, 1952, Bundesgerichtshof, W. Ger., 2 BGHSt 194; G. FLETCHER, *supra* note 38, at 742-46.

122. A good example is the literature's holding that impossible attempts were at

When the courts adopt a scholarly view of the law, we could describe the decision as "making law," but that term—as popular as it might be in our own idiom—obscures the tentative nature of claims of Right. The courts do not "enact" anything in subscribing to particular principles. The principles come to prevail, but they are not legislated.

It may seem paradoxical that a codified system of law would permit and even encourage inferences of Right from the code provisions. The popular image of codified law is that the statutory scheme is not only precise, but also comprehensive. In fact, the French and German Civil Codes are exhaustive in neither sense: they are neither precise nor comprehensive. The distinguishing feature of the European codes, and particularly the German codes, is their structure. The provisions are organized so that some apply across whole chapters and books of the code, and others apply solely to specific problems. Cross-references and interrelationships are assumed. The code cannot be used without first studying its structure and learning to interpret the significance of the position enjoyed by each particular provision.¹²³

The implication of a structured code is that the whole conveys more meaning than the collected messages of its separate parts. Meaning is encoded, as it were, in the structure of the code.¹²⁴ The coherence of the whole and the interrelatedness of the parts enable us to derive principles from the particular provisions.

The assumption of interrelatedness proves to be essential. Suppose that we had three unrelated statutes that referred to the permissibility of injunctions and a hundred others that were silent on the issue. There would be no warrant, as far as I can see, for inferring a general principle of injunctive relief. As we could not develop a grammar from utterances collected from different languages, we cannot infer general principles from haphazard statutory principles. The

least in part exempt from liability, R. FRANK, *STRAFGESETZBUCH FÜR DAS DEUTSCHE REICH*, § 43, at 83-84 (18th ed. 1931), while the Supreme Court held that these same attempts were punishable, see Judgment of June 10, 1880, Reichsgericht, W. Ger., 1 RGSt 451. The difference between the *Lehre* and the case law reflected deeper differences between the objective and subjective theories of liability. See G. FLETCHER, *supra* note 38, at 139-84.

123. It is important, for example, that BGB § 254, defining the principle of comparative negligence, appears in the general part of the second book covering all obligations. It follows that the principles of comparative negligence apply in analyzing liability for contractual breach as well as for tortiously causing harm.

124. In defending the recognition of an "affirmative breach of contract" principle as an institution analogical but extrinsic to the German Code provisions, Staub refers to it as "in-dwelling" in the Code, H. STAUB, *supra* note 114, at 6, and notes cryptically: "For analogy is approved and desired by the Code," *id.* at 22.

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well-grounded belief that a statute or constitution reveals a coherent order, then, is the precondition for relying on the statute in making persuasive claims of Right.

VII. Committed Argument: From Case Law to Principles

There may have been a time when common-law scholars believed that all the cases in a particular field of law coalesced in a consistent and coherent set of rules. That faith is hard to maintain today. Anyone who has studied the cases in a particular field knows how difficult it is to find principles that will explain the case results from different jurisdictions and from different times within the same jurisdiction. If European codes resemble coherent languages, each with its own grammar, then the Anglo-American case law today speaks two or three languages at once.

Judges function in this cacophony by picking a line of cases that supports their view of the law and stressing those precedents to the exclusion of all others. Judges, alas, must argue for one conception of the Right. Yet scholars are not under the pressure of decision. They need not decide for one side; they need not decide at all. What, then, should their posture be in coping with conflicted bodies of case law?

In broad strokes, we can trace three scholarly responses to the inconsistencies of the cases. First, the legal nominalists, falsely called "realists," convinced many of us that, try as we may, we cannot derive coherent principles from the subterfuge of legal rationalization.¹²⁵ For those who believe that cases have little to teach us about the law, the ongoing orthodoxy of the case method of instruction must prove embarrassing. The most we can do in class is speculate about the "process" or perhaps analyze the extra-legal policy values that should have informed the decision.

The nominalist thesis has triggered its antithesis, a rationalist reconstruction of the common law. The reconstruction proceeds by assuming that judges have implicitly followed some standard of rationality in formulating and applying the rules of the common law. The current literature stresses one version of economic efficiency¹²⁶

125. E.g., J. FRANK, *supra* note 11, at 32-41. For a succinct survey of "realism" in its historical context, see Ackerman, Book Review, *DAEDALUS*, Winter 1974, at 119 (reviewing Jerome Frank's *Law and the Modern Mind*).

126. The Kaldor-Hicks standard of efficiency requires merely that rights be assigned to the party willing, hypothetically, to pay the most for them. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 10-12 (2d ed. 1977); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165,

as the standard supposedly underlying the development of the common law.¹²⁷ Using this model of rationality as their starting point, the economic observers read the cases in search of supportive evidence. Of course, there are some striking counterexamples that they cannot explain.¹²⁸ And they have yet to furnish an account for the supposed judicial commitment to efficiency as a value.¹²⁹ Even if an efficient legal system is good for the society as a whole, it does not follow that it is good for judges as a class. Judicial altruism, as distinguished from maximizing one's own utility, hardly fits the economic model of behavior. Yet these counterexamples rarely embarrass the rationalist economists. If the evidence confirms the model, good for the evidence. If not, the data are dismissed as "strange" and "mysterious."¹³⁰

Neither the nominalist study of process nor the rationalist model of efficiency reflects a scholarly commitment to learn from the experience and reasoning of the common-law cases. Nor is there any particular reason why these variations of detached observation should seek wisdom in the case law. The posture of learning from the cases correlates closely with the mode of committed argument. If scholars are engaged in the pursuit of principles of Right, they are likely to see themselves as sharing a common task with the judiciary. In the view of scholars, at least, scholars and judges would both be committed to the goal of refining the basic principles of the system and thus both would have much to learn from argument and criticism.

This third approach, rooted in the mode of committed argument, generates a method for decoding the multiple messages of the case law. The method starts on the assumption that conflicting ways of thinking about the law, conflicting conceptions of Right, might co-

1173-75 (1967). The Pareto standard of efficiency requires that those who gain from the assignment compensate those who lose. See K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 34-45 (2d ed. 1963).

127. R. POSNER, *supra* note 126, at 179-81; Rubin, *Why is the Common Law Efficient?* 6 J. LEGAL STUD. 51 (1977).

128. Posner concedes that comparative negligence is not the correct economic standard, R. POSNER, *supra* note 126, at 124; yet if there is any principle whose time has come, it is that of comparative negligence. See V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 1 (1974 & Supp. 1978) (in period from 1950 to 1977, number of states adopting comparative negligence increased from 5 to 32). See also Priest, *The Theory of Consumer Product Warranty* (forthcoming 90 YALE L.J. (1981)) (warranties implied in law are inefficient).

129. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 471-74 (1975). In a weak reply, Posner suggests that no problem of group conflict exists in the legal system and that, therefore, judges' interests coincide with those of society. See R. POSNER, *supra* note 126, at 415-17.

130. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960) ("[t]he reasoning employed by the courts . . . will often seem strange to an economist"); Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 405 (1978) ("The trend toward elevating personal and downgrading organizational privacy is mysterious to the economist.")

exist. This deeper conflict of principles and methods accounts for the surface inconsistency in the case law. We can see the influence of this method in Kennedy's study of the relative influence of altruism and idealism in the history of contract law¹³¹ and in Ackerman's effort to sort out the different ways of thinking about the takings problem.¹³²

This third mode of scholarship provides the foundations for my own studies in torts and in criminal law. In the last segment of the article, I shall reflect on the method implicit in these studies. My purpose is to develop a level of methodological understanding that will elicit the possible links between those studies and other efforts to learn from conflicted bodies of case law.

VIII. Ideal Types and Conflicting Conceptions of Right

In a half dozen or so different fields of tort and criminal law, we cannot but confront the internal tension of American law. The cases on the burden of persuasion in criminal cases remain an unresolved jumble.¹³³ In the field of accident law, the courts cannot come to a stable view about whether negligence or strict liability represents a better approach to allocating losses.¹³⁴ On the subject of larceny, some significant decisions simply do not accord with the prevailing criteria of punishable takings.¹³⁵ In the law of impossible attempts, the courts simply defy the philosophy of liability incorporated in our reformed statutes.¹³⁶ In these and other contexts,¹³⁷ however, we

131. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

132. B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977).

133. See Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 882-84 (1968).

134. See Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (discussing problem as conflict of paradigms that cut across conventional categories of negligence and strict liability).

135. The prevailing view of larceny requires liability for any intentional taking contrary to the will of the owner. See Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 514-20 (1976). But see *Topolewski v. State*, 130 Wis. 244, 109 N.W. 1037 (1906) (denying liability for completed larceny despite intentional and possibly culpable taking); *Regina v. Miller*, 49 Crim. App. 241 (1965) (same). See generally G. FLETCHER, *supra* note 38, at 70-76, 86-90; Fletcher, *supra*, at 491-98.

136. The revised statutes typically impose liability as if "the attendant circumstances were as [the actor] believes them to be." DEL. CODE ANN. tit. 11, § 531(1) (1979); see MO. ANN. STAT. § 564.011(2) (Vernon 1979) (almost identical language). Yet the case law persistently rejects this "subjective" approach. *E.g.*, *United States v. Oviedo*, 525 F.2d 881 (5th Cir. 1976) (conviction for attempted sale of heroin, reversed); *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973) (conviction for attempted illegal correspondence by a prisoner, reversed). See generally G. FLETCHER, *supra* note 38, at 139-84 (discussing conflicting theories of attempt liability).

137. See, *e.g.*, G. FLETCHER, *supra* note 38, at 836-39 (discussing conflicting conceptions of insanity); *id.* at 856-74 (discussing conflicting "models" of self-defense).

can still seek to learn from judicial efforts to elaborate principles of Right.

My efforts to derive principles from these conflicted bodies of law is guided by the assumption that, at some earlier historical period, the law was consistent and relatively stable. The first stage of such research requires the identification of this classical period and the explication of the operative rules of law as they were then understood.¹³⁸ With regard to the burden-of-persuasion cases, the classical period continued until the late nineteenth century.¹³⁹ In the field of accident law, the period of relative stability came to an end in the early nineteenth century.¹⁴⁰ In the law of larceny, the classical conception of the crime began to wither in the late eighteenth century.¹⁴¹ The dating need not be precise provided that the research reveals some core period of relative stability.

If we can state the law consistently as it might have existed, then we can enter the second and most difficult stage of the method: constructing an account or a rationale of the law as it existed in its consistent phase. Providing this account sometimes requires considerable imagination, for we no longer enjoy an easy familiarity with some ways of thinking that prevailed prior to the ascendancy of instrumental legal reasoning in the last century.¹⁴² Generating this account of our own requires that we suspend judgment, at least temporarily, about the Right, and seek to adopt another way of thinking. This exercise requires anthropological sensitivity in approaching our own past, a past that differs in its modes of thinking, but that might nonetheless influence legal intuitions today. The method requires that we take judicial language seriously and at the same time search for an account that will locate the language in its context. Of course, there is no conclusive way to validate the accounts we might offer of early legal practices. In the end, the interpretation of the past succeeds if and only if it renders past practices coherent and, in their own way, plausible.

The third and fourth stages of the method consist in constructing a competing but nonetheless coherent conception of the law based on

138. Though the assumption of a classical period has guided my own research, I have no quarrel with Kennedy's methodology, which seems to accept the reality of conflict at all stages of history. See Kennedy, *supra* note 131.

139. See G. FLETCHER, *supra* note 38, at 524-38; Fletcher, *supra* note 133, at 899-910.

140. See Fletcher, *supra* note 134, at 560-61. For a slightly different dating, see M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 85-89 (1977).

141. See G. FLETCHER, *supra* note 38, at 90-102; Fletcher, *supra* note 135, at 502-14.

142. On the rise of instrumental reasoning, see M. HORWITZ, *supra* note 140, at 1-30; Dworkin, *Morality and the Law*, N.Y. REV. BOOKS, May 22, 1969, at 29.

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those aspects of the present situation that depart from the past. This requires that we filter off the remnants of the past, state the contrasting mode, and then, by analogy to the second step, develop an account of the modern conception of Right. The modern view admits of more ready understanding, for it is indeed our dominant way of thinking. Still, we might have to state the argument more fully and systematically than commentators, concerned about the small picture, have managed to do.

Comparative studies might be useful in explicating either the traditional or the modern approach to a particular legal problem. Legal systems are often out of phase. What might be a matter of conflict in American law could take a different form in a foreign legal system. German law, for example, now consistently applies the rule that a defendant should receive the benefit of the doubt on all issues bearing on culpability.¹⁴³ The American case law, in contrast, remains inconsistent on the matter. The German position might be an instance of one of the competing modes of thought that shape the American case law.

The study of ancient legal systems might confirm hypotheses about the classical position of the common law. In Roman, Greek, and Jewish law, one finds a pattern that arguably confirms the hypothesis that common-law larceny required a manifestly criminal act.¹⁴⁴ Whether ancient legal systems in fact provide this confirmation depends on a structuralist theory of law, a theory that permits one to assume that the rules of larceny emerged in related forms in diverse legal cultures. Without this structuralist assumption, the evidence of Roman or Greek law hardly helps us to reconstruct the rules of the medieval common law.¹⁴⁵

The fifth and final stage of the analysis consists of both a synchronic and a diachronic analysis. Synchronically, we examine the current state of the law with a view toward diagnosing particular rulings as the expression either of the traditional or of the modern mode of thought.¹⁴⁶ Diachronically, we seek to explain the transition

143. See SCHÖNKE-SCHRÖDER, *STRAFGESETZBUCH* § 186, at 1277 n.11 (20th ed. 1980) (discussing exception to general rule that defendant has to prove truth in cases of criminal defamation).

144. The sources are PLATO, *THE LAWS* para. 874, and 3 GAIUS, *INSTITUTES* para. 189, reprinted in 1 GAIUS, *THE INSTITUTES OF GAIUS* 215-17 (F. de Zulueta ed. 1946), and Watkins, *Studies in Indo-European Legal Language, Institutions, and Mythology*, in *INDO-EUROPEAN AND INDO-EUROPEANS* 321, 342-45 (G. Cardona et al. eds. 1971).

145. I am indebted to David J. Cohen on this point.

146. These are some examples: the ascendancy of strict liability in tort reflects the return to principles of reciprocity, see Fletcher, *supra* note 134, at 570; shifting the

from the older to the newer mode of thought. In seeking these explanations, some people might search for material causes, such as changes in the form of economic organization. The most I have been able to accomplish is to describe the changes by relating the transition in legal thinking to broader currents in intellectual history¹⁴⁷ and sometimes to movements within the law, such as the drive toward codification of the criminal law.¹⁴⁸

Though the studies I have published have these methodological stages in common, there are important differences among them. In some instances, such as larceny, the modern conception of criminality has virtually displaced the traditional mode of thought;¹⁴⁹ in others, such as impossible attempts, the two ways of thinking collide in the current case law.¹⁵⁰ Moreover, in some cases, I regard the movement toward the modern conception of Right as progressive; in other instances, I regret the loss of values that were implicit in the traditional point of view. For example, the movement in the law of homicide, from a practice of tainting all those who cause death toward a greater emphasis on personal blameworthiness, strikes me as salutary.¹⁵¹ The related shift toward requiring the prosecution to prove all matters bearing on blameworthiness also seems to be sound.¹⁵² Yet in other fields, such as larceny and impossible attempts, we could learn much from the values implicit in the traditional ways of thinking.¹⁵³

The explication of the two modes of legal thought illustrates, on a meta-level, a methodology used in studying the substantive law. The mode of committed argument prevailed in the evolution of the com-

burden of persuasion to the defendant reflects the influence of the "private law style" in thinking about the criminal law, see Fletcher, *supra* note 133, at 919-25; acquittals in cases of "staged larceny" reflect the influence of manifest criminality as a condition of liability, see G. FLETCHER, *supra* note 38, at 86-88.

147. For example, I claim that the movement toward requiring the prosecution to bear the risk of residual doubt correlates with the emergence of a normative theory of criminal guilt. See G. FLETCHER, *supra* note 38, at 532-37.

148. This influence seems to have been important in the transformation of larceny. See Fletcher, *supra* note 135, at 503-04.

149. See G. FLETCHER, *supra* note 38, at 103-13; Fletcher, *supra* note 135, at 514-20.

150. Compare *United States v. Oviedo*, 525 F.2d 881 (5th Cir. 1976) (denying liability for intended but impossible sale of heroin) with *People v. Rojas*, 55 Cal. 2d 252, 358 P.2d 921, 10 Cal. Rptr. 465 (1961) (imposing attempt liability for intended but impossible receipt of stolen property).

151. See G. FLETCHER, *supra* note 38, at 343-50, 356-58.

152. On the aborted effort to elevate this rule to a principle of due process, see *Mullaney v. Wilbur*, 421 U.S. 684, 702-04 (1975) (shifting burden on common-law provocation violates due process). But cf. *Patterson v. New York*, 432 U.S. 197, 205-12 (1977) (shifting burden on Model Penal Code version of provocation compatible with due process).

153. On the respect for privacy implicit in the traditional approach to the scope of liability, see Fletcher, *Legality as Privacy*, in *LIBERTY AND THE RULE OF LAW* 182 (R. Cunningham ed. 1979).

mon law.¹⁵⁴ Detached observation has since gained influence without displacing the original mode of committed argument.¹⁵⁵ Thus, in legal thought itself, we find the kind of conflict that characterizes the substantive law of torts and criminal law.¹⁵⁶

What is the best way to describe these competing conceptions of legal thought or of the substantive law? We could make do with the uninformative labels "conception," "mode," or "model." The intriguing question is whether we can claim more for the method by linking it to Kuhn's theory of paradigmatic change¹⁵⁷ or Weber's analysis of ideal types.¹⁵⁸ In my analysis of tort law, I used Kuhn's terminology to capture the combination of normative and stylistic elements in the contrasting "paradigms" of reciprocity and of reasonableness.¹⁵⁹ I am inclined now to appreciate the differences between scientific revolutions and transitions in legal thought. Judges and lawyers seldom propound new theories as a way of bringing change to the legal system. Rather, they frequently attempt to reinterpret history and conflicting precedents as a way of suppressing the significance of a change in practice. Scientists take pride in harvesting new ideas; lawyers and judges see their role as nurturing the tradition. Partly because lawyers in the common-law tradition prefer a low level of philosophical consciousness, the changes they wreak rarely take hold across the board. Though a new mode of thought might gain ascendancy, the traditional way of thinking remains available to judges and scholars yet to be socialized in the new mode of thought. The tendency for the old and the new to coexist in a legal culture marks a sharp difference from the pattern of revolutionary change in scientific paradigms.

There are at least three reasons why the notion of "ideal types" is better suited to the synchronic analysis of interwoven conceptions of the Right. First, as Weber stressed in his seminal work, the ideal type need not be fully realized in the cultural material that one seeks to understand.¹⁶⁰ Second, the methodology of ideal types recog-

154. See pp. 987-88 *supra*.

155. See p. 988 *supra*.

156. Other aspects of the legal culture, such as the ethics of advocacy, lend themselves to the same analysis. See Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29.

157. See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

158. See M. WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 328-63 (T. Parsons ed. A. Henderson & T. Parsons trans. 1947).

159. Fletcher, *supra* note 134, at 543-51, 556-64.

160. M. WEBER, "Objectivity" in *Social Science and Social Policy*, in *THE METHODOLOGY OF THE SOCIAL SCIENCES* 50, 101-03 (E. Shils & H. Finch eds. & trans. 1949).

nizes that to gain understanding of what people are doing, we need to enter into ways of thinking that are foreign to our culturally trained instincts.¹⁶¹ Third, Weber saw the ideal type as a way of explicating the meaning of social action.¹⁶² The effort to understand partly rejected models of legal thought has the same objective. Particular words come into legal discourse with accumulated associations. By explicating the ideal type supporting an argument relying on these terms, we can understand the deeper significance of the advocate's claim.

The explication of judicial language warrants special emphasis. In constructing the ideal types, we reason from the language of the judicial opinions to the underlying premises that, in turn, lead us to a particular interpretation of the judicial language itself. Several examples illustrate this interdependence of data and explanation known as the "hermeneutic circle."¹⁶³ The way in which the term "trespass" is used in judicial opinions generates important evidence to support "manifest criminality" as an ideal type of criminal conduct.¹⁶⁴ Yet only when read against the background of the ideal type does the meaning of "trespass" become clear.¹⁶⁵ Similarly, different conceptions of tort liability induce us to think differently about the concept of fault. In one mode of thinking, fault is negated by proof of an excusing condition;¹⁶⁶ in the contrasting mode of thought, fault is negated by proof of a justification.¹⁶⁷ Thus the phrase "liability without fault" takes on different meanings, depending on whether it is read against the background of one or another ideal type of legal thought.

The hermeneutic dimension confirms the methodology of ideal types as the proper way to explicate conflicting conceptions of the

161. M. WEBER, *The Meaning of "Ethical Neutrality" in Sociology and Economics*, in *THE METHODOLOGY OF THE SOCIAL SCIENCES* 1, 41 (E. Shils & H. Finch eds. & trans. 1949).

162. M. WEBER, *supra* note 160, at 101; see Eldridge, *Max Weber: some comments, problems and continuities*, in MAX WEBER, *THE INTERPRETATION OF SOCIAL REALITY* 9, 28 (J. Eldridge ed. 1980).

163. See K. APEL, *DIE ERKLÄREN-VERSTEHEN KONTROVERSE IN TRANSZENDENTAL-PRAGMATISCHER SICHT* 16 (1979) (discussing coining of term by Droysen); M. HEIDEGGER, *BEING AND TIME* § 32, at 194-95 (J. Macquarrie & E. Robinson trans. 1962).

164. "Trespass" fulfills the same doctrinal role as the German requirement of "breaking." It is significant, for example, that in his dissent in *The Queen v. Middleton*, L.R. 2 Cr. Cas. Res. 38, 56 (1873), Judge Bramwell stresses the requirement both of "trespass" and of a "privy or forcible taking."

165. Given the principles of manifest criminality, one can make sense of the court's denial of liability for an outwardly innocent taking in *Topolewski v. State*, 130 Wis. 244, 109 N.W. 1037 (1906). See G. FLETCHER, *supra* note 38, at 86-88.

166. See Fletcher, *supra* note 134, at 551-56 (nonfault functions as excuse in paradigm of reciprocity).

167. See *id.* at 556-60 (nonfault functions as justification in paradigm of reasonableness).

Right.¹⁶⁸ Yet, in relying on Weber's example, we need not assume that legal thought must proceed as does social theory. It may be that for purposes of social theory, the scholar should remain neutral between competing ideal types.¹⁶⁹ In explicating the conflict immanent in the case law, the scholar should also strive for neutrality. Normative preconceptions render it more difficult to enter into the opposing mode of thought and to grasp its persuasive power.

Yet understanding the conflicting mode of thought does not preclude the scholar's continuing in the mode of committed argument and siding with one conception of the Right. In the mode of committed argument, we seek both to learn from the conflict in the case law and to exercise responsibility for the ongoing refinement of the legal system. As we cultivate the virtues of neutrality, we are drawn back into the committed pursuit of principles of Right. We have no choice but to mediate between the indifference of neutrality and the distortion of argument.

168. On the influence of the hermeneutic tradition on Weber's conception of sociological understanding, see Z. BAUMAN, *HERMENEUTICS AND SOCIAL SCIENCE* 69-72 (1978).

169. *See id.* at 72 (discussing Weber's famous speech on January 5, 1914, advocating value-free social science).